84-1887

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NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1985

JACK CLOPPER,

Petitioner,

v.

MERRILL LYNCH RELOCATION MANAGEMENT INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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May 31, 1985

54 pp

QUESTIONS PRESENTED

1. A jury found in favor of Petitioner on his Unlawful Trade Practices Act claim and in favor of Respondent on Petitioner's breach of contract claim. The Ninth Circuit Court of Appeals, affirming the District Court, granted Respondent's motion for a JNOV on the basis that the two verdicts were inconsistent and the verdict on the breach of contract claim precluded a judgment for Petitioner on the UTPA claim. The first question is whether a JNOV can be based on an inconsistent verdict.

2. After the jury found in favor of Petitioner on the UTPA claim, the District Court weighed the evidence and ruled that there was not substantial evidence to support the verdict. The Court of Appeals refused to review that

determination de novo and applied a clearly erroneous standard. The second question is whether the standard for reviewing the granting of a JNOV is de novo or clearly erroneous.

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OPINIONS BELOW

A copy of the Opinion of the Court of Appeals for the Ninth Circuit of November 13, 1984, affirming the District Court is attached at A-1. A copy of the Order denying the Petition for Rehearing dated March 5,1985 is attached at A-10. A copy of the Opinion of the District Court for the District of Oregon of July 5, 1983, granting Respondent's Motion for a JNOV is attached at A-12.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC Section 1254(1). The jurisdiction of the Court of Appeals was based on 28 USC Section 1291, and that of the District Court was based on 28 USC Section 1332. The judgment of the Court of Appeals was entered March 14, 1985 and the Order denying the

Petition for Rehearing was entered March 5, 1985.

STATEMENT OF THE CASE

Proceedings below

Petitioner, an executive transferred by his employer Xerox Corporation from Portland, Oregon to Alexandria, Virginia, charged Merrill Lynch Relocation Managment, Inc. (MLRM) with violating the Oregon Unlawful Trade Practices Act (UTPA) by representing that it would have his home appraised at fair market value and offer to purchase it for its fair market appraised value and then causing Petitioner's home to be appraised below its fair market value, and by failing to disclose material defects in the appraisals and the appraisal process. He also charged MLRM with violating its contract with Xerox.

The jury found for Petitioner on the UTPA claim and awarded actual damages of $14,207.44 and punitive damages of $250,000. It found for Respondent on the breach of contract claim. Respondent did not object to the verdict, and the jury was discharged.

Respondent then filed its Motion for a JNOV, which the District Court allowed, in part because it found that the verdict for Petitioner on the contract claim precluded any recovery on the UTPA claim, and in part because it found a lack of substantial evidence to support the verdict.

The Court of Appeals affirmed. It reiterated the District Court's legal conclusion that the verdict on the contract claim required the granting of a JNOV as to UTPA claim. It further held that the clearly erroneous standard of review should be applied to the District

Court's determination that there was not subtantial evidence to support the verdict.

Facts

Petitioner owned a home in Portland, Oregon. His employer Xerox requested that he transfer to Alexandria, Virginia. To encourage him, it contracted with MLRM for MLRM to have his home appraised for its fair market value and to then offer to purchase his home for its appraised fair market value. There were substantial economic incentives in the contract for MLRM to be able to resell the house for at least what it paid for it.

The foregoing relocation benefit was communicated to Petitioner orally and by means of a brochure which Respondent printed for Xerox at the time when he was offered the transfer.1/.

In reliance on the opportunity to

sell his home for its fair market value as soon as it could be appraised, Petitioner immediately contracted to purchase a new residence in Virginia, even before the appraisals were done. He did so because he relied on the representation that the standard of the appraisals would be fair market value.

A few weeks later the appraisals were completed. The indicated value of Petitioner's residence from the appraisals was $95,500. His evidence at trial was that its true fair market value was $110,000. Also, he produced an appraiser for MLRM who testified how he was pressured by MLRM on several occasions to provide it with low appraisals, as a result of which he resigned from performing appraisals for Respondent.

Petitioner's expert testified that the appraisals, which MLRM refused at

the time to release to Petitioner, were so improperly performed on their face that they should have been rejected by any review appraiser. She further explained how the appraisals obviously understated the indicated value of Petitioner's home. She explained that when the only two appropriate comparables used by the appraisers were properly adjusted, they indicated a value of $104,000 to $110,000.

MLRM admitted that it owed a duty to Petitioner to review the appraisals and to make certain that they were properly performed. It further admitted that certain of the appraisers' adjustments made no sense and should not have been accepted by a review appraiser without an explanation, which was not obtained.

At the time MLRM offered to purchase Petitioner's home for $95,500, it refused to permit Petitioner to review

the appraisals, and failed to disclose any of their defects.

Because Petitioner had relied on the representation that the appraisals would be at fair market value, and had contracted to buy another home, he was in a predicament. Because MLRM was unwilling to purchase his home for its fair market value, he had to sell it himself at a distress price, but $2,500 above MLRM's price. While part of MLRM's program was to take over "established value " sales to third parties and permit a relocating executive to cash out his equity, MLRM refused that opportunity unless he agreed to release it, which he was unwilling to do.

As a result, he lost $12,000 on lhis house, the difference between its fair market value as found by the jury and what he sold it for under pressure due

to relying on MLRM's representation, plus the additional holding costs until his sale closed plus the interest he had to pay on the bridge loan he obtained to purchase his Virginia residence while waiting for the Portland home sale to close.

REASONS FOR ALLOWING THE WRIT

A. Introduction

The issues raised by the Petition are very basic principals of law. As to the possibility of an inconsistent verdict supporting a JNOV, that ruling is contrary to authority in this Court, FRCP Rule 49b, and the other circuits.

If, as Counsel believes, the decision below on this issue is purely an aberration used to justify a result, it is such a departure from the accepted and usual course of judicial proceedings that this Court should exercise its supervisory power, summarily reverse the

Ninth Circuit, and remand the case for further proceedings.

With respect to the standard to be applied by an appellate court in reviewing the granting of a JNOV, the Ninth Circuit is departing from its own precedent and the better line of reasoning, and joining the Eighth Circuit. It is a common issue that has apparently never been addressed by this Court.

B. The Court of Appeals' decision conflicts with the decisions of other Courts of Appeal, FRCP Rule 49b and a decision of this Court.

1. Inconsistent verdict

Petitioner assumes the verdicts are inconsistent for purposes of this Petition. In fact they are not necessarily inconsistent.

FRCP Rule 49b makes it clear that if a verdict is inconsistent, and objection is made before the jury is discharged, there are two possible remedies: return

the jury for further deliberation or order a new trial. Here Respondent never objected, and the jury was discharged.

Nevertheless, in affirming the District Court, the Court of Appeals held:

> "* * * We agree that within the scope of the issues properly considered by the district court the jury verdict on the contract issue negates appellant's claim of misrepresentation." A-7

In U.S. v. Powell, ___ U.S. ___, 105 S.Ct. 471, ___ L.Ed.2d ___ (1984), this court ruled in a criminal case that inconsistent verdicts do not require a reversal of the conviction, reaffirming Dunn v. U.S., 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed.2d 356 (1932). In explaining why a not guilty finding on one count did not require a finding of insufficient evidence on the count where

the jury convicted defendant, even though the two results were logically irreconciliable, this Court aptly said:

> Whether presented as an insufficient evidence argument, or as an argument that the acquittal on the predicate offense should collaterally estop the Government on the compound offense, the argument necessarily assumes that the acquittal on the predicate offense was proper -- the one the jury 'really meant.' This, of course, is not necessarily correct; all we know is that the verdicts are inconsistent. The Government could just as easily -- and erroneously -- argue that since the jury convicted on the compound offense the evidence on the predicate offense must have been sufficient. The problem is that the same jury reached inconsistent results; once that is established principles of collateral estoppel -- which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict -- are no longer useful." 105 S.Ct. at 478-479

In Stancill v. McKenzie Truck Lines, Inc. 497 F2d 529, 534-535 (5th Cir 1974), the Fifth Circuit held that the failure to object at the time the

verdict is returned is a waiver of any inconsistencies under FRCP 49b. In fact the Ninth Circuit so indicated also in Long v. Swier, 267 F2d 749, 763 (9th Cir 1959)(It is "incumbent upon a party to raise the point as to the regularity of the verdict at the time it was returned with a question attached to it, and before the jury was discharged.")

Here the District Court and the Court of Appeals chose which verdict they preferred and used it to impeach the verdict which they did not like. Their outcome determinative bias has no place in a court of law, and is contrary to Petitioner's right to a jury trial.

2. Standard for appellate review of the granting of a JNOV

In William Inglis and Sons, Etc. v. ITT Continental Baking Co., 668 F2d 1014, 1026-1027 (9th Cir 1981), the Ninth Circuit expressly ruled that the

Court of Appeals is obligated to apply the same standard as the District Court in reviewing the granting of a JNOV, as opposed to reviewing a motion for a new trial, where the standard is whether the District Court's determination was an abuse of discretion.

That appears to be the better rule approved by the commentators. Federal Practice and Procedure, Wright and Miller (1971 ed.), Directed Verdict, Appellate Review Section 2536 at 595 states:

> "Whether a verdict should be directed is a question of law and on those questions litigants are entitled to full review without special deference to the views of the trial court."

That is also the rule in the Eighth Circuit. See, e.g. Lane v. Chwoning, 610 F2d 1385, 1388 (8th Cir 1980).

Nevertheless, the Court of Appeals

held that "(t)he district court found that testimony to be insubstantial, a finding which we cannot describe as clearly erroneous." A-8

However, there is a split of authority. The Tenth Circuit has applied a clearly erroneous standard for appellate review of the granting by the District Court of a directed verdict. Kiner v. Northcutt, 424 F2d 222,223 (10th Cir 1970); Irving v.Dubuque Packing Co., 689 F2d 170 (10th Cir 1982).

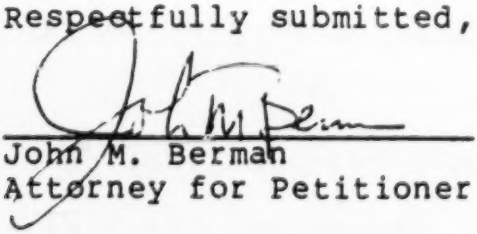
Logic requires that de novo review apply. Otherwise, the District Court's review of the facts would be permitted to temper the jury's determination, interfering with the right to have a jury decide close questions.

CONCLUSION

The legal issues involved here are of national importance because they are

so basic. Petitioner respectfully submits that either these are issues that are so fundamental that they should be settled for all time, or the Ninth Circuit has so substantially strayed from the accepted and normal course of judicial proceedings that this Court should exercise its supervisory powers, summarily reverse and remand for further proceedings.

Respectfully submitted,



John M. Berman
Attorney for Petitioner

FOOTNOTE

1/ From reading the opinions of the District Court and the Ninth Circuit one might conclude that Petitioner had no theory at trial and the jury was totally irrational. Such is not correct.

The District Court said that the representations in the brochure printed by MLRM for Xerox were not part of Petitioner's trial theory, A-17, when they clearly were. Counsel for Respondent understood Petitioner's theory at trial, for in his closing argument he said:

> (Closing argument by Mr. Sand:) The second element is based on this Unlawful Trade Practices Act which is a consumer fraud kind of claim. Here the allegation that must be proved is that Merrill Lynch's people have said something that wasn't true and they did it wilfully and that as a result of these false statments of fact that Mr. Clopper again suffered out-of-pocket damages. * * *; and, that's what they're claiming in this case, a

misrepresentation, a factual misrepresentation which they said were made based upon what is contained in this Xerox brochure which Merrill Lynch Relocation Management Company printed up for Xerox." Tr 612

In a number of other ways the District Court defined away Petitioner's case. For instance, in closing argument Counsel for Petitioner explained the tremendous economic incentive for MLRM to obtain low appraisals. The District Court ruled that it could not consider that argument as having been available to the jury in its awarding punitive damages against MLRM. A-28-29.

For some reason FRCP 15b, which provides for a liberal interpretation of the pleadings to conform to the evidence was not followed by the District Court or the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACK CLOPPER,	)	
	)	
Plaintiff-Appellant,	)	No. 83-4027
	)	
v.	)	DC No.
	)	81-371RE
MERRILL LYNCH RELOCATION	)	
MANAGEMENT, INC.,	)	MEMORANDUM
	)	(FILED
Defendant-Appellee.	)	NOVEMBER
	)	13, 1984

Appeal from the United States District Court For the District of Oregon
Honorable James A. Redden, Judge

Argued and submitted: May 9, 1984

Before: KENNEDY and Ferguson, Circuit Judges, and INGRAM,* District Judge
(*Honorable William A. Ingram, United States District Judge for the Northern District of California, sitting by designation.)

In this diversity case we consider whether the district court erred in granting a motion for judgment notwithstanding the verdict after a jury found defendant/appellee (appellee) liable under the Oregon Unfair Trade Practices Act (UTPA) ORS 646.505 et

seq., to plaintiff/appellant (appellant) and awarded compensatory and punitive damages. We hold tht the district court correctly granted that motion, and affirm the resulting judgment.

Appellant worked for Xerox Corporation in Portland, Oregon, and accepted a transfer on May 9, 1980. Appellant owned a house at that time in Portland which he wished to sell. Xerox and appellee were parties to a contract providing in substance that appellee, a relocation company, would undertake to aid transferred Xerox employees such as appellant in the sale of residential property in the Portland area and elsewhere. Under the terms of the contract, appellee agreed to buy such property at an appraised price to be derived from the average of two appraisals, which were to be furnished by independent qualified appraisers (CR

75), or to meet any price offered within a time period limited in the contract by a qualified third party offeror.

Following his acceptance of the transfer appellant, on May 13, 1980, entered into an agreement to purchase a residence in the Washington area and put up $5000 as "earnest money." Appellant agreed to close that sale on June 30, 1980. On May 16, 1980, appellant listed his Portland house for sale at $110,000. On May 26, 1980, appellant requested the relocation services of appellee and on May 29, 1980, appellee forwarded to appellant a description of the appraisal process by which the appraised price at which appellee would purchase the property was described. Ex. 4, CR 124 et seq. Appellant and appellee each selected an appraiser from a list furnished by appellee and the appraisal reports resulted in an averaged price of

$95,500.

On June 10, 1980, appellant forwarded four purportedly comparable sales to appellee and expressed disagreement with some of the comparables relied upon by the appraisers, and opined that the fair market value of his house was not less than $110,000.

There was no change or adjustment in the appraisals. On June 17, 1980, appellant reduced his asking price to $100,000 and on June 26, 1980, he received an offer of $98,000 from a third party. Appellee did not meet that offer, claiming that it had expired prior to appellant's forwarding of the necessary contractual documents. Ex. 15, CR 149. The third party offer was subsequently accepted by appellant.

Appellant sued appellee for breach of contract1/ and for violation of the

UTPA. The jury found for appellee on the contract claim and for appellant on the UTPA claim.

Appellant's contention under the UTPA claim is that appellee misrepresented to Xerox employees by means of a brochure distributed to Xerox employees by Xerox that appraisals would be based upon fair market value which in fact they were not because appellee tampered with the appraisals and applied pressure on the appraisers to achieve appraisals at less than fair market value; that appellee knew or should have known that the appraisals in this case were defective and failed to advise appellant of the defects; and that as a result appellant sustained ascertainable loss and that the conduct of appellee was wilful.

The district court found that appellant could not on motion for

judgment NOV contend that misrepresentations allegedly made in the Xerox brochure were the misrepresentations of appellee or that appellee failed to disclose material defects and nonconformities in the appraisals and appraisal processes. The court reasoned that those issues were not defined by the issues as framed in the pre-trial order or before the jury and that in consequence appellee had no opportunity at trial to refute those contentions. The pre-trial order, CR 47 et seq., at pages 4, 5 & 6, sustains the ruling of the district court with respect to the alleged misrepresentations in the Xerox brochure and the alleged failure to disclose. We find that the district court properly confined its consideration of the motion to those issues which it found to be properly before it, namely 1) whether

appellee encouraged low appraisals; 2) whether appellee commonly backdated its offers to transferees; and 3) whether appellee impermissibly redefined the requirements necessary to invoke appellee's duty to match third party offers.

The district court, in considering these issues found no substantial evidence supporting the making of misrepresentations by appellee or of the encouragement by appellee of low appraisals. We agree that within the scope of the issues properly considered by the district court the jury verdict on the contract issue negates appellant's claim of misrepresentation. The primary evidence offered by appellant on the question of whether or not appellee encouraged low appraisals was the testimony of one Steffen, an

appraiser not involved in the facts of the instant case, who stated that he had felt pressured in prior dealings with appellee to render low appraisals. The district court found that testimony to be insubstantial, a finding which we cannot describe as clearly erroneous.

The district court found that even if there were a violation of the UTPA that the injuries claimed by appellant were not the result of such a violation. The claimed injury was the money claimed to be lost by the sale of appellant's house at less than fair market value, together with taxes paid on the Portland house pending the third party sale, and expenses, including interest, on an interim loan obtained by appellant to complete the purchase of his new home. The court found no evidence sufficient to support the contention that the purchase of the new

house, the obtaining of the interim loan and sale of the Portland house for $98,000 was the result of action or inaction on the part of appellee. We agree.

Since the district court found no evidence sufficient to sustain a verdict of liability under the UTPA, it properly set aside the verdict.

Appellee indicates its intention to move for attorney's fees pursuant to ORS 646.638(3). We remand to the district court for consideration of that matter.

The judgment is affirmed.

FOOTNOTE

1/ Appellant claimed as a third party beneficiary of the contract between appellee and Xerox.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACK CLOPPER,	)	NO. 83-4027
	)	
Plaintiff-Appellant,	)	ORDER
	)	
vs.	)	
	)	(FILED MARCH
	)	5, 1985)
MERRILL LYNCH RELOCATION MANAGMENT, INC.,	)	
	)	
Defendant-Appellee.	)	

Appeal from the United States District Court for the District of Oregon

Before: KENNEDY and Ferguson, Circuit Judges, and INGRAM,* District Judge (*Honorable William A. Ingram, United States District Judge for the Northern District of California, sitting by designation.)

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Kennedy and Ferguson have voted to reject the suggestion for rehearing en banc, and Judge Ingram has recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JACK CLOPPER, Plaintiff,	)	Civil No.81-371-RE
v.	)	OPINION
MERRILL LYNCH RELOCATION MANAGEMENT, INC., Defendant.	)	

REDDEN, Judge:

On March 31, 1983, a jury returned a verdict in favor of plaintiff and against defendant Merrill Lynch Relocation Management, Inc. (MLRM) on plaintiff's claim under the Oregon Unlawful Trade Practices Act (UTPA). The jury also returned a verdict in favor of defendant and against plaintiff on plaintiff's contract claim. MLRM now moves for judgment notwithstanding the verdict on the UTPA claim. Defendant contends that plaintiff failed (1) to state a claim upon which relief can be granted under the UTPA, (2) to produce

any evidence in support of his UTPA claim, and (3) to produce any evidence in support of actual or punitive damages. For the reasons which follow, I grant defendant's motion. 1/

I. Background

Plaintiff, Jack Clopper, brought this action against MLRM for breach of contract and violation of the Oregon Unlawful Trade Practices Act. Plaintiff is an employee of Xerox Corporation. In May 1980, plaintiff accepted a transfer from Portland, Oregon to Washington, D.C. Xerox had previously retained MLRM to assist them in the transfer of their employees. By contract, MLRM was to buy plaintiff's house at its "appraised value," which is established by averaging the appraisals of two independent appraisers. The appraisers are selected by MLRM and the employee, one each, from a list provided by MLRM.

When the appraised value is established, the employee has three options: (1) accept the offer to purchase the home at the "appraised value;" (2) seek a better price by marketing the home for 45 days and requesting MLRM to meet any better offer; or (3) simply reject the offer and sell the house to a third person purchaser. If, under the Xerox-MLRM contract, the employee receives a higher bona fide offer, that higher offer becomes the "established value." The contract requires MLRM to have a signed contract from the employee before it accepts an "established value" offer.

On May 9, 1980, plaintiff accepted the promotion and received a booklet which included an explanation of the services provided under the Xerox-MLRM contract. He agreed, with Xerox, to start his new job on July 1, 1980. On May 13, 1980, he purchased a house in

Alexandria, Virginia for $155,000. He was bound to close this transaction on June 30, 1980.

On May 16, 1980, plaintiff listed his Portland house for sale, asking $110,000. Plaintiff talked with an employee of MLRM on May 26 and chose a Portland appraisal firm to appraise his house. On June 6, MLRM offered to purchase plaintiff's house for $95,500, which was the "appraised value." On June 10, 1980, plaintiff, thinking this price too low, sent MLRM additional comparable sales data for consideration by the two appraisers. On June 11, plaintiff applied for a "bridge loan" of $61,000 to complete the purchase of the Virginia house.

Plaintiff, who had received no outside offers on his house, lowered the asking to price to $100,000 on June 17. Nine days later, the Singers offered to

buy the Portland house for $98,000. This offer, because it was higher than the "appraised value" offer, became the "established value" offer. Plaintiff informed MLRM of the offer on June 26 but did not sign and mail the required contract until June 30 -- the day after the Singer offer expired.

On July 1, 1980, plaintiff sent a mailgram to a MLRM employee informing her that he had decided to sell the house himself. He then did sell the house to the Singers for $98,000, without further negotiations.

Plaintiff contended that MLRM breached the contract it had with Xerox by "backdating" its written offer by four days and by failing to meet the established value offer of $98,000. The jury, however, found no breach of contract.

Plaintiff also claimed that MLRM

breached the Oregon UTPA. Prior to trial I limited plaintiff to claims under O.R.S. 646.608(1)(e) and (t).2/ In the pretrial order and at trial, plaintiff alleged that MLRM violated the UTPA by (1) encouraging low appraisals, (2) commonly backdating its offers to transferees, and (3) redefining what plaintiff was required to do in order to compel MLRM to meet the established value offer. In his memorandum in opposition to MLRM's current motion, plaintiff belatedly asserts that MLRM violated the UTPA by (1) making misrepresentations in the brochure distributed by Xerox and (2) failing to disclose material defects in the appraisals and material nonconformities in the appraisal process. Plaintiff asserts in this memorandum that MLRM represented that its service had the following characteristics: "(1)

independent appraisals; (2) at the fair market value of the Clopper residence; and/or (3) in the event of a 5% variance in the appraisal, a third appraisal would be ordered." Plaintiff contends that MLRM's service did not have these characteristics and MLRM knew it. Plaintiff, however, cannot support the jury verdict by new allegations or theories at this late date. See William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F2d 1014, 1053 (9th Cir. 1981), cert. denied, ___ U.S.___, 103 S.Ct. 57 (1982). MLRM did not have an opportunity to defend against these contentions at trial, nor did they have an opportunity to challenge plaintiff's new theory to support the punitive damage award. To justify that award, plaintiff now contends that MLRM engaged in price fixing. I do not consider plaintiff's

new theories or allegations as support for the jury verdict. Rather, I examine the evidence as it was presented to the jury.

II. Discussion

A. The Standard for Judgment Notwithstanding the Verdict

In passing upon a motion for judgment notwithstanding the verdict, I must give appropriate deference to the jury's verdict. The granting of such a motion is only proper "if, without accounting for the credibility of the witnesses, we find that the evidence and its inferences, considered as a whole and viewed in the light most favorable to the nonmoving party, can support only one reasonable conclusion -- that the moving party is entitled to judgment notwithstanding the adverse verdict." William Inglis & Sons Baking Co., supra, 668 F2d at 1026. I am not permitted to

weigh the evidence, nor am I permitted to reach a result I find more reasonable as long as the jury's verdict is supported by substantial evidence. Id. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Janich Bros., Inc. v. American Distilling Co., 570 F2d 848, 853 n.2 (9th Cir. 1977). The evidence in this case fell short of that standard.

B. The UTPA Claims

Plaintiff brought this action under O.R.S. 646.608(1)(e) and (t) which provide, in part:

> A person engages in an unlawful practice when in the courseof the person's business, vocation or occupation the person:
>
> (e) Represents that ... the services have ... characteristics, ... benefits, ... or qualities that they do not have ...
>
> (t) Concurrent with tender or delivery of any ... services fails

to disclose any known material defect or material nonconformity ....

In order to recover under the UTPA, plaintiff must have proved (1) that MLRM made false representations of the characteristics of its service or that it failed to disclose a material defect in its service; (2) that the misrepresentations or failure to disclose were wilfully done; (3) that plaintiff relied on the misrepresentations; (4) that plaintiff suffered an ascertainable loss; and (5) that the loss was the result of MLRM's actions. O.R.S. 646.638(1); Denson v. Ron Tonkin Gran Turismo, Inc. 279 Or 85, 91, 566 P2d 1177; Terry v. Hoden-Dheni Enterprises, Ltd., 48 Or App 763, 768, 618 P2d 7 (1980). While plaintiff need not prove that the alleged misrepresentations were material, he must prove that MLRM failed to disclose

a material defect. Searcy v. Bend Garage Co., 286 Or 11, 16, 592 P2d 558 (1979). Likewise, while plaintiff need not prove that he relied on the nondisclosures, he must show that he relied on the alleged misrepresentations. Sanders v. Francis, 277 Or 593, 598, 561 P2d 1003 (1977); Caldwell v. Pop's Homes, Inc., 54 Or App 104, 110, 634 P2d 471 (1981).

Plaintiff's evidence did not show that MLRM made any misrepresentations to him. Even assuming that for the sake of argument that the statements made in the Xerox brochure were representations of MLRM, plaintiff did not show that they were false. The brochure stated that MLRM would obtain two independent appraisersto appraise plaintiff's house. The average of their appraisals would equal the "appraised value." While the brochure states that the two appraisals would be averaged to

determine "the Fair Market Value" of the house, this is not a representation that the appraisals would equal what plaintiff thought was the fair market value of his house. In fact, even plaintiff's expert testified that an appraisal is simply a judgment call -- the opinion of the individual appraiser.

The evidence showed that MLRM did everything that the brochure said it would do: it arranged for two appraisals, it allowed plaintiff to select one of the appraisers, it averaged the two appraisals, and it offered to purchase plaintiff's house for the "appraised value." The jury found that MLRM fulfilled its duties as they were described in the Xerox brochure since it found that MLRM did not breach the contract with Xerox.

The jury's verdict for plaintiff under the UTPA must have been based on

plaintiff's allegation that MLRM encouraged low appraisals and failed to disclose this fact to plaintiff. The only evidence plaintiff offered in support of this theory was the testimony of Phil Steffen, an appraiser who had previously appraised property for MLRM. Mr. Steffen testified that he felt "tacit pressure" to come in with low appraisals. This testimony is insufficient, however, to show that the appraisers who appraised plaintiff's house were encouraged to give it a low appraised value. All of the persons who appraised plaintiff's house testified that the only pressure they felt was to come in with accurate appraisals. Furthermore, the uncontroverted testimony showed that MLRM had no incentive to give low appraisals. In fact, the evidence showed that there was a financial disincentive against low

appraisals.

Even if MLRM's alleged encouragement of low appraisals was a material defect which it failed to disclose, plaintiff cannot recover under the UTPA. Plaintiff introduced no evidence of a wilful violation of the UTPA. In order to recover under the statute, plaintiff had to prove that MLRM "knew or should have known that (its) conduct was a violation (of the UTPA)." O.R.S. 646.605(9). Plaintiff also failed to prove that he suffered an ascertainable loss as a result of MLRM's failure to disclose. The jury awarded plaintiff $14,207.44 in actual damages. In computing this award, the jury obviously subtracted the $98,000 plaintiff received from the $110,000 he originally asked for the house. The jury then added the $2,207.44 plaintiff testified he paid in interest on the bridge loan and taxes on

the Portland house.

These damages were not caused by MLRM's alleged violation of the UTPA. Plaintiff bought his house in Virginia on May 13 and set the closing date for June 30. He applied for the bridge loan in order to meet this June 30 closing date. No action or inaction by MLRM caused plaintiff to seek interim financing. The fact that plaintiff accepted $98,000 for his Portland house, believing it was worth more, was not a result of MLRM's actions. He chose to lower his asking price to $100,000 when no interest was shown at $110,000. He chose to accept the $98,000 offer without further negotiations. Plaintiff testified that he felt pressured, but it was his independent decision to purchase the new residence, and commit to a June 30 closing date that created any pressures that he felt.

Under the Xerox-MLRM contract the plaintiff had three options: sell to defendant at the "appraised value," sell to MLRM at the "established value" figure, or sell independently to a third party purchaser. Plaintiff exercised the latter option, and did so voluntarily.

Plaintiff failed to prove a violation of the UTPA. Therefore, I grant defendant's Motion for Judgment Notwithstanding the Verdict on the UTPA claim.

B. Punitive damages

MLRM also claims in this motion that there was insufficient evidence to support the jury verdict of $250,000 in punitive damages. I find that plaintiff failed to prove a violation of the UTPA and is not entitled to punitive damages under the statute. Alternatively, I find that plaintiff did not establish the requisite elements for an award of

punitive damages under the UTPA.

Punitive damages may be awarded under the UTPA only if the common law requirements are met. Crooks v. Payless Drug Stores, 285 Or 481, 490,592 P2d 196 (1979). In order to award punitive damages a jury must find that a defendant's conduct amounts to an intentional disregard of plaintiff's rights. Abrams v. Mike Salta Pontiac, 51 Or App 495, 501, 625 P2d 1383 (1981). The evidence failed to show the type of aggravated conduct which warrants an award of punitive damages. I, therefore, grant defendant's Motion for Judgment Notwithstanding the Verdict on the punitive damages issue as well.

The closing argument of plaintiff's counsel and his "economic analysis" argument in his memorandum in opposition to this motion are not evidence and cannot be considered by me as support

for the jury verdict. Plaintiff failed to introduce any testimony showing MLRM was guilty of "wanton misconduct." McGregor v. Barton Sand & Gravel, Inc., 62 Or App 24, 27, ___ P2d ___ (1983). Given this failure of proof, the jury award of punitive damages is not supported by substantial evidence.

III. Conclusion

Plaintiff failed to prove a violation of the UTPA. There was not substantial evidence to support the jury award of either actual or punitive damages. I, therefore, grant defendant's Motion for Judgment Notwithstanding the Verdict. I deny plaintiff's Petition for Attorney's Fees.

Dated this 5th day of July, 1983.

/s/

James A. Redden

United States District Judge

FOOTNOTES

1/ Plaintiff's petition for attorney's fees as the prevailing party under the UTPA is also before me. Plaintiff, however, is no longer the prevailing party under the UTPA since I have granted defendant's motion for judgment notwithstanding the verdict. I, therefore, deny plaintiff's petition for attorney's fees.

2/ In their post trial memoranda, the parties both assert that I allowed plaintiff's claim under O.R.S. 646.608(1)(g) to go to the jury. This is incorrect. A close reading of the jury instructions indicates that I only submitted to the jury plaintiff's claims under O.R.S. 646.608(1)(e) and (t). I held prior to trial that plaintiff did not state a claim under subsection (g) because, to be actionable under this

subsection, the representation must be referential. Denson v. Ron Tonkin Gran Turismo, Inc., 279 Or 85, 90, 566 P2d 1117 (1977). That is, the representation must compare services to an "an objective and independent standard." Id. at 91. Plaintiff did not allege or prove that MLRM had ever compared its service to anything else.